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IN THE

Supreme Court of the United States.

No. 54, OCTOBER TERM, 1935.

GEORGE EVERETT LEGG, *Petitioner,*

vs.

E. ST. JOHN, TRUSTEE IN BANKRUPTCY,

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONER, LEGG.

Future monthly "disability" payments to a totally and permanently disabled policyholder, belong to him and his children, and do not pass to his Trustee in Bankruptcy, because

1. **They are exempt under the laws of Tennessee.**
2. **They have no Cash Surrender Value and do not pass to the Trustee.**
3. **Even if they had a Cash Surrender Value, the bankrupt can pay such value as of the date of filing the petition in bankruptcy, and hold the policy free from his creditors.**
4. **Future "disability" benefits are akin to future earnings, and the Trustee is not entitled to them.**

HENRY ROBERTS,
J. K. BROWN,
WM. MARSHALL BULLITT
Counsel for Petitioner.

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THIRD POINT: Even if the "Disability" feature is neither "Life" insurance nor an "Annuity" (and consequently, non-exempt under Tennessee Laws), still it is certainly an "Insurance Policy" under § 70(a)(5) of the Bankruptcy Act; and, therefore, either

(a) The Disability feature has no Cash Surrender Value whatever, and does not pass to the Trustee; or

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OPINION BELOW: *Legg* v. *St. John*, 76 F. (2d) 841.

JURISDICTIONAL AUTHORITY: Judicial Code § 240(a) as Amended by Act of February 13, 1925.

STATUTES INVOLVED: Tenn. Code (1932) §§ 8456, 8458; Bankruptcy Act §§ 6, 70(a); 30 Stat. 548, 565.

DATE OF JUDGMENT: District Court, September 5, 1934 (R. 15); C. C. A. April 15, 1935 (R. 22); certiorari granted May 27, 1935 (R. 26).

NATURE OF THE CASE, RULINGS, ETC. Legg had a life insurance policy, which, *inter alia*, provided that if he became totally and permanently disabled, the company would pay him a monthly disability income so long as he remained disabled.

Legg became totally and permanently disabled. Later he went into bankruptcy. The C. C. A. held that the future monthly disability payments passed to the Trustee in Bankruptcy for the benefit of Legg's creditors, until his debts should be paid (*Legg* v. *St. John*, 76 F. (2d) 841; R. 3, 10, 25). Legg insists that they are *exempt*, and should go to him.

IN THE

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No. 54, OCTOBER TERM, 1938

GEORGE EVERETT LEGG, *Petitioner,*

v.

E. ST. JOHN, Trustee in bankruptcy.

On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PETITIONER LEGG

The sole question involved is whether the future $134.52 monthly "Disability" benefits under a Life Insurance policy, should be paid,

1. To the "totally and permanently disabled" bankrupt policyholder (on the ground that such "disability" benefits are (1) *exempt* by State or Federal statute from the claims of creditors, or (2) after acquired property akin to *future earnings, Local Loan Co.* v. *Hunt,* 292 U. S. 234);

Or whether they should be paid

2. To the policyholder's Trustee in Bankruptcy (on the ground that a "Disability" contract is not an "insurance policy"; that Legg's *disability* at the time of his bankruptcy was in the nature of a *cash asset,* and the "disability" benefits thereafter arising therefrom are *not* exempt by either State or Federal statute; but pass to the Trustee as *non*-exempt property).

OPINION BELOW: *Legg* v. *St. John,* 76 F. (2d) 841 (R. 22).

RELEVANT STATUTES

(Bankruptcy Act July 1, 1898, §§ 6, 70(a); 30 Stat. 548, 565. Code of Tennessee (1932), §§ 8456, 8458).

The Statutes are set out in the Appendix at page 49 *infra;* but the pertinent parts are briefly summarized in the margin*.

STATEMENT OF THE CASE

On September 28, 1927, the Metropolitan Life issued to Legg a Life Insurance policy, with the following monthly Disability and monthly Death benefits:

(1) If Legg became "totally and permanently *disabled*", the Company would (a) waive payment of the

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*** Tennessee Code (1932) Secs. 8456, 8458**

Sec. 8456. Any *life* insurance on a husband shall inure to the benefit of his wife and children, and the money arising therefrom shall go to them free from the husband's creditors.

Sec. 8458. The net amount payable under any *policy of life insurance* or under any *annuity contract* made for the benefit of, or assigneed to the wife or children shall be exempt from all claims of creditors, irrespective of any reserved right to change the beneficiary.

Bankruptcy Act Sec. 6, 70(a)

Sec. 6. The Bankruptcy Act shall not affect property that is *exempt* by the laws of the State of the bankrupt's domicile, *i. e.*, Tennessee.

Sec. 70(a). The Trustee in Bankruptcy shall be vested with title to all the bankrupt's *non*-exempt property; with a special provision that,

> "When any bankrupt shall have *any insurance policy* which has a cash surrender value payable to himself . . . . he may . . . pay or secure to the trustee the sum . . . and continue to hold, own, and carry such policy free from the claims of the creditors . . . ."

future $475.22 annual premiums, and (b) pay to him, or if mentally incompetent to the beneficiary, a monthly income of $174.52, so long as such disability continued (R. 6 C).

(2) If Legg *died*, the Company would pay his beneficiary* 240 installments of $100 per month for 20 years aggregating $24,000 (R. 6 A).

On June 18, 1930, Legg became **totally and permanently disabled**; and thereafter the Company paid $174.52 per month on the 18th of each month, to and including February 18, 1934, when a creditor's injunction prevented further payments (R. 3, 7, 17).

On March 8, 1934, Legg filed a petition in bankruptcy; and on the same day was adjudicated a bankrupt (R. 2).

On April 10, 1934, the Trustee reported (R. 3):

> **"I hereby set aside said life insurance policy and the cash surrender value thereof as exempt,** but [I report] that the disability benefits are not exempt, but is an asset of the estate."

That report was approved by the Referee, the District Court, and the C. C. A. (R. 10, 12-15, 25). Consequently, Legg did not pay [under Bankruptcy Act § 70a] any Cash Surrender Value to the Trustee.

The only question presented here, is:

Who shall get the <u>future</u> monthly "Disability" benefit payments?

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* On May 8, 1931, Legg named his four children as beneficiaries reserving the right to change the beneficiary (R. 6 G).

The C. C. A.'s Decision

[*Legg* v. *St. John*, 76 F. (2d) 841; R. 22.]

The C. C. A. (6th) *correctly* held that the following benefits were *exempt property* under the Tennessee laws, and were properly set aside to the bankrupt (R. 23; Cf. R. 3, 9, 10, 12-15), to-wit:

> (A) *Death* benefit of 240 installments of $100 a month for 20 years aggregating $24,000; and also the Cash Surrender Value* (if demanded) of the entire policy on the date of adjudication (Tenn. Code, §§ 8456, 8458);
>
> (B) *Disability* benefit to the *limited extent* of (*a*) waiver of the $475.22 annual premium during disability and (*b*) $40 per month out of the $174.52 monthly "Disability" income (Tenn. Code, § 7711);

But the C. C. A. *erred* in holding:

First: That the policy was *split up* into two separate, distinct contracts, one of "Life" insurance, and another of "Disability" insurance, subject to *different* rules and statutes; and

Second: That such "Disability" benefit was, in turn, *further split up* into (1) the *waiver* of $475.22 annual

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* The Cash Surrender Value so set aside would be (if demanded), the Cash Surrender Value as given in the Table (R. 6 B), *minus* the "$1400 and something" indebtedness on the Policy (R. 17); but of course, the bankrupt would never demand such few hundred dollars of Cash Surrender Value, because it would cancel the Policy.

premiums [B(*a*) *supra*] to go to the bankrupt as his *exempt* insurance property; and into (2) "Disability" income also further *split up*, so that (*a*) $40 a month should also go to the bankrupt as his *exempt* property [B(*b*) *supra*] while (*b*) the *balance* of the "Disability" income ($134.52 monthly (C) *infra*) should go to the Trustee in Bankruptcy (as Legg's *non*-exempt *non*-insurance property), to-wit:

> (C) $134.52 a month (*i. e.* $174.52 *minus* the said $40), so long as Legg's disability continued.

The correctness of that holding (C) is the sole question in this case.

Specification of Errors

The C. C. A. erred in holding that $134.52 per month, of the future "Disability" benefit payments, was *non*-exempt and should be paid to the Trustee in Bankruptcy so long as Legg continued to be "disabled", until his debts were paid in full.

[See next page for "Summary of Points Discussed"]

SUMMARY OF POINTS DISCUSSED

1. The Legg Policy is not divided into two separate distinct contracts, one of which (Life) is exempt property, while the other (Disability) is non-exempt. It is simply a Life Insurance contract, with both "Disability" and "Death" Benefits; and hence was exempt under both the Tennessee law and the Bankruptcy Act (pp. 7-29, infra).

2. The Policy is exempt property (Tennessee Code Sections 8456, 8458); and that exemption covers the monthly "Disability" Benefits as well as the monthly "Death" Benefits (pp. 30-37, infra).

3. Even if the "Disability" feature were neither "Life" insurance nor an "Annuity" [and consequently, non-exempt under Tennessee laws], still it is certainly an "insurance policy" under Sec. 70(a)(5) of the Bankruptcy Act; and, therefore, either,

(a) The "Disability" feature has no Cash Surrender Value whatever and does not pass to the Trustee; or

(b) Its Cash Surrender Value (if any) should be ascertained, and Legg given an opportunity to pay the same to the Trustee, and then to hold the "Disability" feature (and the future benefit payments thereunder) "free from the claims of the creditors" (pp. 37-44, infra).

4. Any future "Disability" payments to Legg are in the nature of future earnings, or after-acquired property, neither of which passed to the Trustee upon the filing of the petition in bankruptcy (pp. 44-48, infra).

FIRST POINT

The Legg Policy is not divided into two separate independent distinct contracts, of which one (Life) is exempt property, while the other (Disability) is non-exempt.

It is simply a Life Insurance Policy with both "Disability" and "Death" Benefits; and hence was exempt under both the Tennessee law and the Bankruptcy Act.

In accordance with Legg's application for a "Whole Life with Disability" policy (R. 6 E; Q. 15 Part A), the Metropolitan Life issued to him a policy with both "Disability" and "Death" benefits, which may be briefly summarized as follows:

Analysis of the Legg Policy

Death benefits. For a $425.83 annual premium, there was a Death benefit, payable in 240 monthly installments of $100 each (aggregating $24,000), commutable into a $17,450 single lump sum (R. 6 A).*

Disability benefits. In consideration of an additional premium of $49.39 payable annually, the Metropolitan Life agreed that, in the event of Legg's total and permanent disability before he was 60 years old, it would (1) waive the entire $475.22 premium for both the "Death" and "Disability" benefits, and (2) pay to Legg, or if

* Two pages of "Provisions and Benefits" set out various options and non-forfeiture Benefits, *i. e.*, "paid up" and "extended" insurance, loans and cash surrender values as given in a Table (R. 6 B, D); provisions for reinstatement, participation in surplus, loans, etc., and incontestability.

mentally incompetent to the beneficiary, a monthly income of $174.52 as long as his disability continued.

Legg was given the option, at any time, of cancelling the Disability benefit feature, in which event he would no longer have to pay the $49.39 additional premium; but he could *not* cancel the "Death" benefit and at the same time *retain* the "Disability" feature.

The provision for the "Disability" feature was given on a full page of the policy headed (R. 6 C);

> **"Total and Permanent Disability**
>
> WAIVER OF PREMIUMS AND PAYMENT OF MONTHLY INCOME
>
> Supplementary Contract attached to and made part of Life Insurance Policy No. 5081405-A issued on the Life of George E. Legg."

The "Disability" feature was printed on a separate page (rather than by a numbered paragraph) so that the *same* "Disability" benefits could be physically inserted as an integral part of *any* of the numerous different life insurance policy forms. Of course, the "Disability" feature *could* have been printed as an integral part of each policy; and its separate printing [and insertion] was a mere matter of convenience and printing economy.

It will be referred to as the "Disability" contract (the phrase used by the C. C. A.), or as the "Supplementary Contract", **but without implying that it is in any way a separate or distinct contract.** It is merely one of the

various contractual provisions contained in the Legg policy.*

If the provision for "Disability" benefits had been printed as a separately numbered Paragraph 15 (instead of being printed upon a page to itself and physically inserted in, and attached to, the policy form), it would simply have been one of the fifteen provisions in the Life

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* *Express Recitals.* The caption describes it as a

"Supplementary Contract attached to and *made part of* Life Insurance Policy No. 5081405-A issued on the life of George E. Legg."

It expressly provides:

"In consideration of the application for this Contract, as contained in the application for said Policy, the latter being the basis for the issuance hereof . . ."

"This Supplementary Contract shall be deemed to be *a part* of the above numbered Policy . . ."

Interwoven Provisions. The following quotations are illustrative:

"While said Policy and this Supplementary Contract are in full force"

The premiums waived are those "under said Policy and this Supplementary Contract";

The premium waiver shall begin on the "anniversary of said Policy";

The Disability benefits shall not be payable if "the said Policy shall be in force by virtue of any non-forfeiture provisions thereof".

If there be any "indebtedness to the Company under said Policy" the interest thereon shall be deducted from the Disability benefits;

The Supplementary Contract "shall automatically terminate" upon default in the payment of "any premium on said Policy".

policy, other provisions being for loans, cash surrender values, paid up and extended insurance, participation in surplus, etc.

The provisions of the modern Life insurance policy are the result of over a hundred years of evolutionary process, and can best be understood by a brief summary of that development.

EVOLUTION OF LIFE INSURANCE POLICY FORMS*

Early Form. Originally, life policies were a mere promise to pay a lump sum at death, provided the annual premiums were fully paid; with rigid restrictions as to residence, travel, and occupation; and a *complete forfeiture* in event of any default in payment of premium,

* See Maclean, J. B.: Life Insurance (4th Ed.); Hutcheson, W. A.: The Evolution of Life Insurance, T. A. S. A. XXI, p. 331; Hutcheson, W. A.: Some Facts in the Development of Life Insurance in the U. S., Proceedings of the Association of Life Insurance Presidents, (1920) p. 53; Macaulay, T. B.: Canadian Life Assurance, Proceedings of the Association of Life Insurance Presidents, (1920) p. 107; Knight, C. K.: The History of Life Insurance in the United States to 1870; Zartman and Price: Yale Readings in Insurance, chaps. 5-7; Moir, H.: Liberality of Modern Policies, T. A. S. A. XII, p. 175; Elston, J. S.: The Development of Life Insurance in the United States during the Last Ten Years, T. A. S. A. XXVII, p. 330; Kopf, Edwin W.: The Early History of the Annuity, P. C. A. S. XIII, p. 225; Moir, H.: Divergent Developments of Life Insurance in Britain and America, T. A. S. A. XXIX, p. 51; T. A. S. A. is the abbreviation for the Transactions of the Actuarial Society of America and P. C. A. S. is for the Proceedings of the Casualty Actuarial Society; Dawson's "Business of Life Insurance", pp. 61-106; "Elements of Life Insurance", pp. 97-111; "Things Agents Should Know", pp. 218, 226-234; and Mass. Reports on Life Insurance, 1859-1865.

suicide, duelling, military service, or violation of any restrictive provision.

Dividend and Non-forfeiture Clauses. About ninety years ago, mutual companies began to distribute surplus accumulations in the form of scrip or small "paid-up" additions to the face of the policy; followed by policy provisions to the same effect; later extended to cash payments convertible into various forms of policy benefits (cash, cash on deposit at interest, reduction of premium, paid-up additions, extended insurance, etc.); followed by the so-called "deferred" or "tontine" dividends until forbidden by law in 1906.

Beginning in 1860, (progressively extended by statute and contract) "non-forfeiture" benefits were first introduced, so that in the event of a failure to pay a premium, the policyholder (instead of having to forfeit the results of many years' payments) was given various optional benefits, such as paid-up insurance in a reduced amount, extended insurance of the face amount for a limited time, guaranteed cash values, "grace" periods for paying premiums, etc.*

Liberalizing provisions. Incontestable clauses were introduced; restrictions as to occupation, residence, travel, military service, etc., were removed or greatly modified; a copy of the application was attached to and made a part of the policy, and the statements therein were made representations and not warranties.

"Endowment" policies became frequent, where the face of the policy was paid *before* Death.

* See Mass. Reports on Life Insurance, 1859-1865, pp. 21-24; Report for 1863, p. 222.

Modern extensions of Life Insurance. As early as 1877 some policies provided that in the event of total and permanent disability, a part of the insurance should be paid immediately, and the balance paid at death ("Disability Benefits in Life Insurance Policies", p. 2, 2d. Ed., Actuarial Society of America, 1932).

About 1906 "Standard provisions" began to be required by law to cover many of the foregoing subjects, as well as reinstatements, misstatement as to age, etc.;* and gradually life insurance policies began to contain (either required or authorized by statute or State Insurance Departments) a great many new Benefits, such as,

(1) Instead of paying the face of the policy in *one lump sum,* payment (at the insured's option) would be made in annual installments for many years (as in Legg's policy).

(2) Policies could be changed into different forms.

(3) Very liberal "extended insurance" benefits.

(4) Insurance on "loans" so that if Death occurred before a loan was repaid, the full face of the policy would still be paid.

(5) *Total and Permanent Disability benefits.*†

(*a*) About 1910, the companies began to insert clauses that if the insured became "totally and per-

* Conference of Governors, Attorney Generals and Insurance Commissioners at Chicago, February, 1906; and Sub-Committee's Report, December 1, 1906, entitled "Recommendations for Uniform Legislation Relating to Life Insurance".

† See Hunter & Phillips' "Disability Benefits in Life Insurance Policies", Actuarial Study No. 5 (2d Ed.) Part I ch. I-V. (1932) "Disability Benefits. Recent Developments in the U. S. A." Transactions of the Tenth International Congress of Actuaries, Rome 1934 xii; "Disability Benefits under Life Insurance Contracts in the United States and Canada" and various "Papers on Disability Benefits" at the Eighth International Congress of Actuaries, London, 1927.

manently" disabled (possibly unable to pay his life insurance premiums), the company would waive the payment of premiums so long as such disability continued (*New York Life* v. *Edwards,* 271 U. S. 109, 117, 118). Some companies made no charge in their premium for such a clause. Others made a trifling increase, say twenty-five cents, for that additional feature.

(*b*) A little later, the "Disability" benefit was expanded so as to provide not only for (1) such waiver of premiums, but also for (2) the payment of the face of policy in ten (or more) *annual* installments, generally beginning about one year after disability—a sort of acceleration or precipitation of payment of the policy—the amounts so paid to correspondingly reduce the final amount of the policy payable at death, thus extinguishing the entire policy in (say) ten years, even *without* Death. For thus anticipating such payments of the insurance before death, some companies slightly increased their premiums. (Cf. U. S. War Risk Insurance Act, Oct. 6, 1917, 40 Stat. 398, and World War Veterans Act 1924, § 300, 43 Stat. 624, providing for "United States Government *life* insurance" with "Death" benefits up to $10,000, and with "Disability" benefits payable in monthly installments up to $57.50 for each $10,000 policy, the aggregate of such monthly installments paid, to be *deducted* from the face of the policy upon death.)

(*c*) The next step—a very important one—was to make such *annual* payments, but *without reducing*

the amount of insurance payable at death; and for that privilege the companies also increased the premium to a small extent.

(*d*) About 1920, a further liberalization followed, by which (instead of *annual* payments), the company paid a *monthly* income—generally 1% of the face of the policy—thus giving the permanently disabled policyholder and his family a monthly income to live on, instead of compelling him to wait till the end of the year.

(*e*) The next step in the evolutionary process of this phase of Life Insurance, was this: instead of requiring the policyholder to *prove* that his disability was both total *and* would continue for life, certain circumstances were specified, in the event of which the permanence of existing total disability would be presumed.

(6) *Double Indemnity benefits.*

(*a*) About 1915, many Life policies began to contain a clause that if the policyholder met his death while riding on a *common carrier*, the company would pay double the face of the policy.

(*b*) About 1918, a further liberalization in Life policies took place. The policyholder was given the privilege of paying a very small increase in premium, and have his policy contain a clause that the company would pay double the face of the policy—so-called "Double Indemnity"—if he met death by accidental means, a very popular provision in present day Life policies.

BASIS OF ALL LIFE INSURANCE CALCULATIONS

The many forms of life insurance policies, *e. g.* Term, Ordinary Life, Limited Payment Life, Endowment, etc., and also Annuities, (whether with or without "disability" benefits) are all based on exactly the same principles for every age and on every plan* (Cf. *Maddox* v. *Mutual Life,* 193 Ky. 38; *Miller* v. *New York Life,* 179 Ky. 246).

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* For all Life Insurance policies providing for *Death* benefits only, the Company assumes three things, to-wit:

(*a*) That a very large group of persons, say 100,000 of the same age, will, at the same time, take out exactly similar policies of the same amount.

(*b*) That those persons will die strictly in accordance with some specified Mortality Table; so many each year, no more and no less; and that the deaths will take place at the end of the respective years.

(*c*) That the Company will earn some specified rate of interest (say 3%) on its funds.

For all Life Insurance policies providing for *Death and Disability* benefits, the Company assumes five things, to-wit:

(*a*), (*b*) and (*c*) above; and also two further things in accordance with some Disability Table, *i. e.*

(*d*) That of the 100,000 persons assumed in (*a*) above, in each year a certain number (but not the same number each year) will become totally and permanently disabled; and

(*e*) That of the number so becoming totally and permanently disabled in any one year, a definite number (no more and no less but not the same number each year), will annually *cease* to be totally and permanently disabled (either by death or by recovery from the disability).

Upon those assumptions, and by a purely arithmetical calculation, the Company determines the premiums upon the different forms of policy.

Because of the assumptions on which based, and the small premiums charged for the Total and Permanent Disability benefits, they could only be so issued as an incident to and as a part of a Life Insurance (or Annuity) Policy. Such benefits cannot be obtained separately. After having been issued as a part of a Life Insurance Policy, they cannot be continued in force independently of the Death benefit in the Life Insurance Policy.

From the foregoing review of the evolution of life insurance policies (the standard "old line" life companies having about seventy million (70,000,000) policyholders, about ninety-eight ($98,000,000,000) *billions* of life insurance in force, and with about twenty-two ($22,000,000,000) *billions* of assets on hand), it is easily seen that the Legg policy is simply an ordinary Life insurance policy covering both "Death" and "Disability"; and that those subjects are so woven together that while the "Death" benefits may be obtained or continued separately, the "Disability" feature can neither be obtained nor continued separately, but only as an incidental feature to the regular "Death" benefit.

Criticism of the C. C. A.'s Decision

The Referee, District Court and C. C. A. held that the Legg policy consisted of two entirely separate and distinct contracts, one of which was *life* insurance, and the other *permanent disability* insurance, and that totally different

principles governed these alleged distinct contracts. The Referee said (R. 8, 9):

> "That the said life insurance policy and the said supplementary contract as to disability benefits are two wholly separate contracts, one a life insurance and the other a contract of indemnity against total and permanent physical disability . . . This contract for disability benefits *is not a life insurance policy,* and the provisions of law peculiar to life insurance do not govern."

The C. C. A. said (R. 24):

> "Considered separately, the disability contract in no sense provides for life insurance. It is effective before death, upon a contingency, and is payable directly to the insured.* . . . In short, the disability contract *is not a life insurance contract* . . ."

1. That decision is erroneous, because it *fails to recognize the evolution* in modern life insurance policy forms. It undertakes to split up the Legg policy into two distinct contracts, (a) old-fashioned life insurance, and (b) disability insurance; and then to apply different rules as to them, respectively; *whereas,* the proper view point is, that the entire Legg policy is one of installment *life* insurance, providing (1) for the payment at *death* of 240 monthly

* So is Endowment insurance, which this Court expressly recognized as *Life* insurance in *Burlingham* v. *Crouse,* 228 U. S. 459, 472, saying:

> "Originally *life* insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been much varied in form since, **and policies payable in a period of years, so as to become investments and means of money saving, are in common use.** . . . While *life* insurance is property, it is *peculiar* property."

installments and (2) for a waiver of premium and a payment of monthly income, in the event of total and permanent *disability*, which latter provisions are but incidental to, and a part of, the main *life* ins[redacted] (See authorities, pp. 23-29, *infra*).

Of course, if the State statutes would permit such a thing, an insurance policy *might* be so drawn as to contain *two distinct* and *totally independent* contracts, *i. e.* one for "life" and the other for "disability" insurance—subject, respectively, to the different statutes (if any) applicable to those two fields of insurance.

But the Legg policy was not that kind of policy. The Legg policy was carefully designed to be a "life" policy, with both "Disability" and "Death" benefits so interwoven as to be an integral part of the "life" policy.

The unification of the "life" and "disability" provisions in the Legg policy is illustrated by the provision that the Metropolitan Life may deduct any unpaid interest on the policy loan from the monthly disability payments; consequently, if Legg quits paying interest upon his policy loan, the Metropolitan Life can collect the interest by deducting it from the future payments which the C. C. A. directed it to make to the Trustee in Bankruptcy; but if the Metropolitan Life should exercise its contract right to make such deduction, the Trustee would probably rule it for contempt in failing to pay to the Trustee the full $134.52 per month, which the Bankruptcy Court ordered the Metropolitan Life to pay to the Trustee (R. 10). The C. C. A.'s decision ignored the Metropolitan Life's rights in this respect.

2. The "Disability" contract provided for two benefits during disability, *i. e.*

Benefit No. 1—Waiver of premiums on entire policy;
Benefit No. 2—Monthly benefit payment.

If, as the C. C. A. held, the "Disability" contract was *not* one of "life" insurance (and hence *non*-exempt under the Tennessee statute exempting *life* insurance), then *both* of its Benefits, No. 1 *and* No. 2, should have gone to the Trustee in Bankruptcy as *non*-exempt property, in which event (A) the Trustee would collect No. 2, *i. e.* the monthly "Disability" payments so long as Legg remained disabled: and (B) the Trustee would be entitled to collect the ***asset value*** of No. 1 (*i. e.* "waiver of premiums") which is a valuable and determinable monetary right, to-wit, $475.22 per year during Legg's disability, but since the Trustee has no other method of enforcement of No. 1, he would, at Legg's death, be entitled to reimbursement (out of the proceeds of the life insurance) for the aggregate of the premiums waived, with 6% interest thereon.

Such a result of the C. C. A.'s theory is directly contrary to § 70(a) of the Bankruptcy Act, because, as to such *non*-exempt property, the bankrupt has the right, upon the payment of the Cash Surrender Value, if any, of such *non*-exempt property, to "hold, own and carry such policy free from the claims of the creditors" (*Holden* v. *Stratton,* 198 U. S. 202, 213; *Hiscock* v. *Mertens,* 205 U. S. 202, 214; *Burlingham* v. *Crouse,* 228 U. S. 459, 473;

Everett v. *Judson,* 228 U. S. 474; *Andrews* v. *Partridge,* 228 U. S. 479); and such a result would have been equally in conflict with the Tennessee exemption statutes, because any reimbursement (out of the policy's proceeds at death) to the Trustee of the amount of the premiums waived, would be to apply a part of the *proceeds* of the policy to the husband's creditors, which is precisely the thing that the Tennessee statutes prohibited (p. 30 *infra,* note).

In order to prevent that obvious conflict, the C. C. A. [after first holding that the Disability contract was *not* "life" insurance, so as to avoid the Tennessee exemption statute], retraced its steps and split up the Disability Benefits into (*a*) No. 1, a waiver of premiums (which it gave back to the bankrupt as "life" insurance exempt under the Tennessee statute), and (*b*) No. 2, a monthly income (which it gave to the Trustee in Bankruptcy as *non*-exempt property*).

The inconsistency of the C. C. A.'s position is obvious.

If the Disability contract was *not* "life" insurance, then the benefits provided by the Disability contract were *non*-exempt under Tenn. Code §§ 8456, 8458, and *both* Benefits Nos. 1 and 2 should have gone to the Trustee. But when the C. C. A. gave Benefit No. 1 to the bankrupt, that was an admission that the Disability contract was, in part at least, "life" insurance and hence *within* the terms of the Tennessee exempting statute.

But, how could the Disability contract be "life" insurance as to the waiver of premiums, and *not* "life" insurance

* Less $40 a month exempt under Tenn. Code Sec. 7711.

as to the monthly income? Neither benefit was contained in the so-called "life" part of the policy; but both benefits were physically contained in, *and solely in,* the one separate page constituting the Disability contract.

The C. C. A.'s position is manifestly erroneous in trying to hold that the Disability contract is *not* "life" insurance, in order to render it *non*-exempt under the Tennessee statute; and then to hold that *part* of it *is* "life" insurance, and, as such, is *exempt* and goes to the bankrupt.

Further argument is unnecessary to show that the C. C. A.'s position is untenable.

3. The C. C. A. cited no authority for its holding that the contracts were separate and distinct (R. 24). The Referee and the District Court relied upon *Chattanooga Sewer Pipe* v. *Dumler,* (1929) 153 Miss. 276, and *Cravens* v. *Robbins,* 8 Tenn. App. 435.

Neither case involved, or even considered, the Bankruptcy Act. Each turned exclusively upon the construction of a State exemption statute.

The Trustee's Brief errs when it says (p. 6) that the *Chattanooga Sewer Pipe* case decided that a disability contract was not "an insurance policy" within the meaning of the Bankruptcy Act. The "Disability" benefits involved in the *Chattanooga Sewer Pipe* case were due and payable more than two years *before* bankruptcy; whereas, the "Disability" benefits involved in the case at bar, are exclusively those to become due *after* the adjudication.

Cravens v. *Robbins,* 8 Tenn. App. 435, in a very scanty opinion, held that a $61 check paid for a "weekly indemnity for disability" under a policy of *health* insurance, was not exempt from execution under a statute exempting "*life* insurance" from execution. It is obviously not in point here, because it related to pure *health* insurance, and not to *life* insurance.*

* Although not cited by the courts below, not by the Trustee here, *In re Kern,* 8 F. Supp. 246, did decide that a Trustee in Bankruptcy was entitled to the *future* accruing "disability" benefits under a policy quite similar to the Legg policy.

The Court held that the New York statute exempting *life* insurance policies, did *not* exempt such *disability* benefits. The New York Legislature had previously corrected such a view, by the Act of May 14, 1934 (Laws of 1934, Ch. 626), which expressly provided that such "disability" benefits *should be exempt from seizure* by creditors.

In the *Kern* case, the District Court distinguished *Burlingham* v. *Crouse, supra,* on the ground that "It dealt only with *life* insurance" and added:

> "Here the policies combine two types of benefits. They embody a provision for life insurance and a provision for an annuity payable to the bankrupt on a contingency which has happened. The latter is not life insurance in any sense of the term; it more nearly resembles a health policy. . . . It can make no difference that in the present case the contract for life insurance and the contract for disability benefits happen to be set forth in one and the same policy."

There again, the District Court failed to appreciate the evolutionary process by which the old-fashioned life insurance policy had gradually expanded to include the more modern provisions above reviewed (pp. 10-14, *supra*), and that the policy still remained one of *life* insurance, notwithstanding the evolutionary addition of "double indemnity" and "disability" benefits.

Exactly contrary to the *Kern* case, is the opinion of Mr. Justice Cropsey of the Supreme Court of New York in *Ruvinsky* v. *Shonberg,* N. Y. Law Journal, Sept. 10, 1935. (See Appendix p. 50, *infra,* for CROPSEY, J's, review of the *Kern* case.)

The Legg policy was essentially one of *life* insurance. The additions, in the event of total and permanent disability, of (a) waiver of premium and (b) payment of a monthly income, did not deprive the policy of its character of *life* insurance, to which should be applied all statutes applicable to *life* insurance.

REVIEW OF AUTHORITIES

The statutes of many States recognize that various forms of "disability" and "double indemnity" benefits may properly be incorporated in policies of *life* insurance, without thereby making them subject to the laws governing either health or accident insurance.* Tennessee has no such statute, but its Insurance Commissioner has so recognized and approved that development (See Petition for Certiorari, pp. 25-27).

The Courts have generally so recognized the true nature of the present-day life policies.

In *New York Life Ins. Co.* v. *Edwards,* 271 U. S. 109, in applying the Revenue Act of 1913 to "life" insurance the Court assumed, without discussion, that the "disability" benefit contained in the "life" policies did not change their nature or convert them *pro tanto* into *accident* policies; and did not take them out of the law applicable to "life" insurance policies.

* See Appendix p. 52, *infra,* for list of State Statutes in nearly thirty States.

The case was decided upon the undisputed assumption that a "disability" benefit was an integral part of a *"life"* insurance policy.

In *Wittman* v. *Littlefield,* 142 Misc. 916 (Aff'd. 235 App. Div. 831), it was held that a New York statute exempting the "proceeds and avails" of a life insurance policy, also exempted the usual *"disability" income* payable under life policies, the Court saying:

> "The statute exempts the "proceeds and avails" of the policy. The disability clauses are customarily combined with and included in our present day insurance policies (Insurance Law § 70 as amd.). It is only fair to regard the *disability benefits* as within the purview of section 55-a."

In *Purcell* v. *Washington Fidelity Ins. Co.,* (1932) 141 Ore. 296, in reply to the question "What *accident or health* insurance have you . . .?", the applicant answered "None". He had a *life* policy, with the usual "disability" provision. The Court said there was no misrepresentation, saying:

> "We believe that it is a matter of common knowledge that the layman classifies a policy of insurance issued by a straight life insurance company like the Penn Mutual as life insurance, even though it contains a minor provision for protection against disabilities. We believe that the layman generally regards as health or accident insurance a policy which undertakes to indemnify against disabilities arising from ill health or accidents, even though it also stipulates for a sum payable upon death as the result of an accident."

Prudential Ins. Co. v. *Litzke,* (1934) —— Del. ——, 179 Atl. 492, describes the typical Life policy with a

monthly income "disability" benefit provision, as "a *life* insurance policy", saying:

> "The Company, having adopted disability benefits as additional inducement for the taking of policies . . . The policy here in issue is a life insurance policy carrying a disability clause . . ."

In *Paulson* v. *Montana Life Ins. Co.*, ——— Wash. ———, 43 Pac. (2d) 971, an ordinary life insurance policy calling for a lump sum premium, contained both "disability" and "double indemnity" benefits, with a provision for deducting a fixed sum from the premium, if the "disability" and "double indemnity" benefits were discontinued. In holding that the incontestable clause did not apply to the "disability" and "double indemnity" benefits, the Court said:

> "There was only the one policy. The policy was written as an entirety, having as incidental features to the straight life insurance, the disability and double insurance benefits. . . . As we have heretofore said, the outstanding policy was issued as an entirety."

In *Mutual Benefit* v. *Bell,* (1934) 49 Ga. App. 640, a man had two policies of life insurance, each with the usual "disability" clause. In applying for accident insurance, he was asked what other health and accident insurance he had. He did not disclose the existence of the two life policies with "disability" benefits. The Court held that there was no misrepresentation, because, as the Court said:

> "The fact that they [life insurance policies] contain total disability clauses would not render them straight

health and accident policies or what is ordinarily meant by health and accident insurance policies. *Provident Life* v. *Rimmer,* 157 Tenn. 597; *Logan* v. *Fidelity & Cas. Co.,* 146 Mo. 114; *Mutual Reserve* v. *Dobler* (C. C. A.), 137 F. 550; *Briggs* v. *Bankers Acc. Ins. Co.,* 214 Ill. App. 181."

In *Baranovich* v. *Horwatt,* 113 Pa. Sup. Ct. 467, 173 Atl. 676 a "group" life policy provided for paying the face amount in the event of permanent disability. It was held that the face amount was *exempt* from creditors, under a statute exempting the proceeds of a "group" policy. The Court said:

"It is a matter of general knowledge that life insurance policies are termed 'general', 'ordinary', 'old line', 'paid-up', 'tontine', 'assessment', 'endowment', etc., dependent upon the terms and conditions of the different forms of contracts. The newer forms of policies and their broader provisions are designed to meet competition between the companies and to attract purchasers. Cooley on Insurance, vol. 1, pp. 782, 783, states: 'Life insurance is not, however, necessarily insurance for the full term of one's life. Some life policies are contracts of investments as well as of insurance'. **The addition of these new features does not divest the policy of its chief character, or make it other than a life insurance policy.** We do not recall any policy of group life insurance that we have had to consider, and there have been a number of them, that did not contain a disability provision. **In passing upon policies containing total disability provisions, the courts have expressly referred to them as life insurance policies.** *Elwood* v. *New England Mut. L. Ins. Co.,* 305 Pa. 505; *Perlman* v. *N. Y. Life Ins. Co.,* 105 Pa. Super. Ct. 413."

Similarly, it is held that the usual provision for "double indemnity" (in case of death by accidental means) is not accident insurance, but is straight life insurance with the incidental provision for such "double indemnity".

In *Provident Life & Acc. Co.* v. *Rimmer,* 157 Tenn. 597, an applicant was asked:

> "What *accident* or health insurance have you . . . ?"

He did not disclose that he had two $10,000 policies of life insurance, each with a provision for "double indemnity" in case of death by *accident.*

The Court held that there was no misrepresentation or concealment, because those policies were policies of *life* insurance, and *not* of *accident* insurance. The Court said:

> "The policy in the Equitable Life Assurance Society covered loss of life from natural as well as external and accidental causes, and was life insurance. **The mere addition of the double indemnity clause providing for increased insurance upon proof of death by accident did not divest the policy of its character of insurance on life, or make the contract other than life insurance,** for insurance on life includes all policies of insurance in which the payment of the insurance money is contingent upon the loss of life." [Citing seven cases.]

In *Lamar Ins. Co.* v. *Culp,* (1934) 168 Tenn. 332 an applicant was asked: "Is your *life* now insured?". He failed to disclose a $7,500 *accident* policy. It was held that the converse of the rule in *Provident Life* v. *Rimmer,* 157 Tenn. 597, was "necessarily true"; and that in answer to

a question as to insurance upon his *life*, the applicant need not tell of an *accident* policy.

The *Rimmer* and *Culp* cases establish for Tennessee the rule (1) that a life policy with "double indemnity" in case of death by accident is *not* accident insurance, and (2) a policy insuring only against death by accident is *not* life insurance—even though life policies constantly contain insurance against death by accident.

In *Levin* v. *Scranton Life*, 304 Pa. 92, an ordinary life policy had a supplemental rider providing for "double indemnity" in case of death by accidental means. The man was injured *before* default in premium, but died *after* the default. The Court held that the insured could not recover as under an accident policy, because it was a *life* policy with "double indemnity" for death by accident; but it was *not* an accident policy.

New York Life v. *Doerksen*, 64 F. (2d) 240 (C. C. A. 10th), held that a policy with the usual "double indemnity" and "disability" benefits was a *life* policy, and was *not* an accident policy, the Court saying:

> "Decisions of the Supreme Court of Kansas have recognized a clear distinction between policies of life insurance, and policies of health and accident insurance; and have classified life insurance contracts with double indemnity provisions as life insurance policies, and not as health and accident insurance policies. *Balch* v. *Federal Life Ins. Co.*, 116 Kan. 560; *Zeigler* v. *Kansas Life Co.*, 120 Kan. 252."

The foregoing cases all rest upon a recognition of the evolution of "life" insurance policy forms—a view ex-

pressly recognized in *Burlingham* v. *Crouse*, 228 U. S. 459, 472, and aptly expressed in *Mutual Life* v. *Smith*, 184 Fed. 1, 3, as follows:

> "All insurance was once new, and insurance in its early stages covered few contingencies; but the business under the law has grown until the idea of insurance now spreads itself broadly over many subjects and many contingencies."

If we are correct that the Legg policy is simply a *life* insurance contract with both "disability" and "death" benefits, then it necessarily follows that the entire Legg policy is *exempt*

> (*a*) As *life* insurance, under the Tennessee Act; and
>
> (*b*) Under the Bankruptcy Act § 6, *because* it is exempt under the Tennessee Act;
>
> Being thus exempt, it could never, at any time, pass to the Trustee in Bankruptcy under § 70(a) (*Burlingham* v. *Crouse*).

If, for some unanticipated reason, it should be held to be *non*-exempt under the Tennessee Act, then it is subject to the insurance clause of § 70(a) of the Bankruptcy Act, by which, even then, the Trustee does not take title, until after the bankrupt has first had an opportunity to pay the Cash Surrender Value,—if any, in which event the bankrupt holds the insurance free from the claims of his creditors.

SECOND POINT.

The Legg policy is exempt property under Tenn. Code §§ 8456, 8458. That exemption covers the monthly "Disability" Benefits as well as the monthly "Death" Benefits.

1. *Exemption for "life insurance" and "money thence arising".* Tennessee Code § 8456 provides:

> "Any *life* insurance effected by a husband on his own life shall, in case of his death*, inure to the benefit of his widow* and children; and the *money thence arising* shall be divided between them according to the statutes of distribution, without being in any manner subject to the debts of the husband."

Are the "Disability" monthly payments exempt from Legg's creditors?—just as the Cash Surrender Value is admittedly exempt.*

The C. C. A. admitted that the Tennessee statute exempting life insurance must be liberally construed (*Dawson* v. *National Life,* 156 Tenn. 306, and cases therein cited; *In re Stansell,* 8 F. (2d) 363); but held that the Disability contract was not a *life* insurance contract; and, consequently, that the "disability" income was *not* exempt under § 8456 (R. 24).

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* Nothwithstanding the significant phrases "in case of his *death*" and "*widow*", the Tennessee Courts have definitely construed that statute to mean that a life insurance policy, and its Cash Surrender Value, are both exempt from the claims of the husband's creditors *during his lifetime,* as well as after his death (*Dawson* v. *National Life,* 156 Tenn. 306; *Lunsford* v. *Nashville S. & L. Corp.,* 162 Tenn. 179; *In re Stansell,* 8 F. (2d) 363).

"Disability" income is certainly money "arising" from the Legg policy. It is *exempt* under § 8456, *unless* the C. C. A. is correct in holding that the "Disability" contract is *not* life insurance.

To the C. C. A.'s argument on that point, we respond:

The C. C. A. wholly failed to understand the evolution of life insurance. The "life" and "disability" contracts are not separate and distinct (see pp. 7-29, *supra*).

If the Disability feature is a part of a "life" policy, then the "disability" benefits are *exempt* under the Tennessee statute; and, therefore, exempt under § 6 of the Bankruptcy Act.

2. *Exemption of money payable under any life policy or "any annuity contract."* A later Tennessee statute (§ 8458) was passed in broader terms so as to cover cases that § 8456 did not cover:

> § 8458. "The net amount payable under *any policy of life insurance* or under any *annuity contract* upon the life of any person made for the benefit of, or assigned to, the wife and/or children, or dependent relatives of such person, shall be exempt from all claims of the creditors of such person arising out of or based upon any obligation created after the effective date of this Code, whether or not the right to change the named beneficiary is reserved by or permitted to such person."

(A) § 8458 exempts the net amount *payable* under *any* policy of life insurance. It does not limit the exemption to *Death* benefits. It covers the net amount *payable* under a *life* policy.

Suppose a policy promised to pay $10,000 upon death or upon total and permanent disability. If a man became totally and permanently disabled, would not the $10,000 be exempt from his creditors? It would certainly be an "amount *payable* under" the policy, although not dependent upon *death.* The same rule should apply where (as here) the Legg policy promises to pay in monthly installments $24,000 on death, and $174.52 per month during disability.

(B) § 8458 next exempts the net amount payable "under *any annuity contract* upon the life" of the insured which has been "made for the benefit of or assigned to" his children. Legg designated his children as the beneficiaries of the policy (R. 6 G). Therefore, the Tennessee law exempted the "disability" income, *if* the "Disability" contract was an *"annuity* contract"?

Policies providing for monthly payments beginning at a date in the future, provide annuities; and are exempt from creditors under a statute exempting the "proceeds" of a life policy (*In re Horwitz,* 3 F. Supp. 16, and cases therein cited; *Fidelity Investment Assn.* v. *Emerson,* 318 Ill. 548; 1 Couch on Insurance, § 25); but as there had been a doubt in some decisions whether life insurance *exemption statutes* applied to annuity contracts, the Tennessee Legislature solved that doubt by § 8458 and made it perfectly plain that payments under *"any annuity contract"* should be exempt from the claims of creditors.

In *Bowers* v. *Reinhard* (C. C. A. 3d), decided July 12, 1935, a bankrupt had three contracts in the Equitable Life,

which provided that he should receive a monthly annuity at the age of 65 for the remainder of his life, with the right to surrender the policy and receive the cash value thereof, and to change the beneficiary or assign the contract. If the bankrupt died before the first payment, his wife would receive designated death benefits.

Under a Pennsylvania statute identical with Tenn. Code § 8458, the Court held that the contracts were *annuity* contracts and exempt from his creditors, saying:

> "We think it clear that where, as in this case, the wife is named beneficiary, the contract is 'made for the benefit' of the wife. The character of the contract is not altered by the fact that Bowers had the option to change the beneficiary. . . . This court has had occasion to construe the Act, when applied to life insurance policies. In *Dussoulas* v. *Lang,* 24 F. (2d) 254, affirming *In re Lang,* 20 F. (2d) 236, we held that the policy in suit was a *life* insurance policy for the benefit of the insured's wife, since she was the named beneficiary, even though the insured had the option to change the beneficiary. We think the same reasoning applied to *annuity* contracts."

The point in that case is that the C. C. A. (3d) held that the annuity contract was *"made for the benefit of"* the wife, even though she was only a contingent beneficiary. As the Tennessee statute is identical, the Legg "Disability" contract if an annuity contract, was certainly "made for the benefit of" his children, when it is provided that, if Legg became mentally incompetent, his children shall receive the monthly payments.

Furthermore, as policies payable to the husband are, nevertheless, exempt *during his lifetime* under § 8456 (p. 30, note, *supra*), the same reasoning exempts an annuity contract under § 8458, even if it were payable to the husband. *A fortiori,* it is exempted, where, as here, the husband can designate the recipient of the monthly payments, and in the event of his mental incapacity they go absolutely to his children, as beneficiary of the policy.

(C) In the Metropolitan Life's 1927 Rate Book (pp. 5, 16) the annual premium rate of the particular form of policy issued to Legg is given for his age (39 years); and is described as "whole Life" and "Disability Provision (Waiver of Premium and Monthly Annuity)".

If the present controversy (instead of being between Legg and his creditors) had been between Legg and the Metropolitan Life, surely every court would hold that the Metropolitan Life had sold to Legg a "life" policy with a "disability" *Annuity* provision. If, for some reason, it had been to the interest of the Metropolitan Life to deny that it had issued to Legg a "life" policy, with an *"annuity"* contract as a part thereof, would any court have listened to such a contention by the insurance company, in view of the description which it gave in its literature of the thing it was selling to Legg?

Such description is not an isolated one; but in the same Rate Book under the heading "Premium Rates for Total and Permanent Disability", the Metropolitan Life repeatedly described the monthly "disability" income pro-

vided for in the Legg policy, as an "Annuity", as follows:

> "In considering the issuance of any Waiver of Premium and Monthly *Annuity* Disability Benefit . . . the maximum amount of Disability Waiver of Premium and Monthly *Annuity* Benefit . . . regular Waiver of Premium and Monthly *Annuity* provision with omission of matter covering payment of the *Annuity* (p. 14 A)"
>
> "Disability Benefits: Waiver of Premium and Monthly *Annuity*" (p. 14 B).
>
> "Waiver of Premium Granted only when Insured has full amount allowed on *Annuity Benefit*" (p. 14 B).
>
> "Ordinary and Intermediate—This Disability *Annuity* Provision will not be issued . . . unless . . ." (p. 15).
>
> "Disability Provision (Waiver of Premium and Monthly Annuity)" as applied to many varieties of life policies (pp. 16-19).
>
> "If total and permanent disability occurs before age 60, a monthly *annuity* of $10 for each $1000 face amount . . . will be paid . . . Where disability occurs after age 60, no *annuity* is payable" (p. 36).
>
> "Total and Permanent Disability (Waiver or Premium and Annuity) all acceptable ages $25,000" (p. 64).

Later editions of the Metropolitan Life's Rate Book re-emphasize the same point for *hundreds* of different *life* policies, as, for example (1930 Ed.), the statements:

> "No *disability annuity* granted on $500 policies . . . " (Formula for hundreds of policies repeated *thirty-six* times pp. 313, 349; repeated *twenty* times pp. 359-380; repeated *sixteen* times pp. 389-404.
>
> "No *disability annuity* granted with this policy (pp. 349-354, 381-388).
>
> "Deferred Annuities. This disability benefit provides, in the case of male lives, that if total and permanent disability occurs before the beginning of deferred annuity payments, future premiums will be waived and the Company will pay a monthly income of $6 for each $10 of deferred annuity called for by the contract, *such disability annuity* being payable during disability up to the time the deferred annuity payments begin and no longer" (p. 21).

Under the heading of "Total and Permanent Disability Provision", there are repeated references to the "disability" income payments as being a "monthly *annuity*" (pp. 20-21).

This demonstrates that the Metropolitan Life, in its technical literature describing and offering for sale the Legg and similar policies, described the "disability" benefit as a "monthly *annuity*".

Text-writers' definitions of an "annuity" exactly cover such payments as the "disability" income in the Legg policy (3 C. J. pp. 199, 200, 205, 206; Clark's "Outlines for Review of the Fundamental Principles of Law", p. 256 (1923); *Cf. Anderson* v. *Hammond,* 2 Lea (Tenn.) 281; *Morgan* v. *Pope,* 7 Cold. (Tenn.) 541); and payments of this very nature have been held to constitute an annuity (*New York Life* v. *Majet,* (Miss.) 161 So. 156).

It is unnecessary to consider the refinements and distinctions between annuities certain, contingent annuities, life annuities, deferred annuities, immediate annuities, survivorship annuities, annuities for life contingent upon continued disability, etc.

The point is that Tenn. Code, § 8458 intended to cover *all kinds of annuities,* when it provided that the net amount payable under *any* annuity contract upon the life of any person should be exempt from his creditors, if the annuity contract was made for the benefit of his children, as was the case in the Legg policy.

The monthly "disability" income payable during the continuance of Legg's disability, is exempt by the laws of Tennessee from the claims of his creditors, both as money "arising" under a life policy (§ 8456); and especially as an amount "payable" under an **"annuity"** contract for the benefit of his children (§ 8458).*

THIRD POINT

Even if the "Disability" feature were neither "Life" insurance nor an "Annuity" (and consequently, non-exempt under Tennessee Laws), still it is certainly an "Insurance Policy" under § 70(a)(5) of the Bankruptcy Act; and, therefore, either,

(a) The "Disability" feature has no Cash Surrender Value whatever, and does not pass to the Trustee; or

(b) Its Cash Surrender Value (if any) should be ascertained, and Legg given an opportunity to pay the same to the Trustee, and then to hold the "Disability" contract (and the future payments thereunder) "free from the claims of the creditors".

Even if the Legg "Disability" contract is *non*-exempt under the Tennessee laws, still it is surely an "insurance policy" under the Bankruptcy Act, § 70(a)(5).

§ 70(a) provides that:

> "When any bankrupt shall have *any insurance policy* which has a cash surrender value . . ."

* Legg's children are not only named as the beneficiaries (R. 6 G); but, in the event of Legg's mental incapacity, the monthly income must be paid to the children (R. 6 C).

Congress did not limit that provision to *"life"* insurance; but it used the broader term *"any insurance* policy". The language, therefore, certainly embraces the "Disability" contract, even if it be considered separate and distinct from the "life" insurance feature; because the Disability contract is certainly a policy insuring against Disability.

This Court has definitely decided the true meaning of the Bankruptcy Act § 70(a) to be that any property (insurance or otherwise) which *is exempt* under the State laws, does not pass to the Trustee; but that as to any insurance that is *non*-exempt under State laws, the entire field as to such *non*-exempt insurance is embraced in the insurance clause of § 70(a), with the following effect:

(*a*) If the insurance has *no* Cash Surrender Value, it remains the property of the bankrupt, and does not pass to the Trustee at all;

(*b*) If it has a Cash Surrender Value, then the bankrupt, by paying such value to the Trustee, can retain the insurance, free from the claims of his creditors.

In view of that construction, is it not plain that the words "any insurance policy", used in § 70(a) includes not only old fashioned life insurance policies, but was intended to include any kind of contract which undertakes to protect an individual against death, disability, accident, sickness, ill health, or, against too long a life itself.*

* The reason a person buys a policy of ordinary old fashioned life insurance is that he fears he will *die*. The reason a person buys such a policy with an incidental Disability feature is that he fears he may *live* many years after losing his earning power, and wants a monetary protection for himself during his life.

If the C. C. A. meant that the words "any insurance policy" refer only to a *life* insurance policy, and that a Disability policy *is not* a "life" policy, we can only reply that such a construction would do great violence to the Congressional language. If Congress had intended to limit § 70(a) to a "life" insurance policy, it was easy to say "any *life* insurance policy". The fact that Congress did *not* say *"life* insurance policy", but said *"any insurance* policy", demonstrates that it did not intend to confine § 70(a) to a *"life"* insurance policy, but meant § 70(a) to include something more—perhaps a great deal more.*

The C. C. A. did not even consider the point that, (upon its own assumption that the "Disability" contract was separate and distinct from the "life" contract), nevertheless, the "Disability" contract was "an insurance policy" within the meaning of § 70(a); that it had no Cash Surrender Value; and, hence, such "Disability" contract remained in the bankrupt and did not pass to the Trustee (*Burlingham* v. *Crouse,* 228 U. S. 459, 469, and cases there cited).

In *Burlingham* v. *Crouse,* this Court definitely settled that a policy which had *no* Cash Surrender Value, did not pass to the Trustee. Therefore, even if the Legg

* The Trustee in Bankruptcy may contend that *Burlingham* v. *Crouse* (and the cases following it) only dealt with conceded "life" insurance policies, and did not relate to a *non*-life insurance policy, such as the C. C. A. held the Legg Disability contract to be. To such a contention, we respond: It is true that the cases heretofore arising have dealt with "life" policies; but as just shown, pp. 37-39, *supra,* § 70(a) is not limited to "life" insurance, but is all embracing, covering *"any insurance policy"*, which is broad enough to cover a policy *insuring against total and permanent disability.*

"Disability" contract is *non*-exempt under the Tennessee statute, nevertheless, as it confessedly has *no* Cash Surrender Value, **it did not pass to the Trustee.**

We submit:

I. *The Disability contract (as separate and distinct from the "life" policy) has no Cash Surrender Value whatever; and it did not pass to the Trustee in Bankruptcy* [§ 70(a) *as construed in* Burlingham v. Crouse].

1. The Disability contract does not contain a single word about any Cash Surrender Value (R. 6 C). *Burlingham* v. *Crouse,* 228 U. S. 459, held that if an insurance policy had *no* Cash Surrender Value, it did not pass to the Trustee. Therefore, as there was no Cash Surrender Value to the Disability contract as a separate entity, it did not pass to the Trustee, but remained the property of the bankrupt; and the C. C. A. erred in giving the "Disability" income subsequently arising thereunder to the Trustee (R. 10, 23).

2. If it be urged that the Legg policy does contain a Table of "Cash Surrender Values",* we reply that such Cash Surrender Value was contained in, and referred solely to, the alleged separate and distinct "*life*" contract. The Legg policy can not be *split up* into two alleged separate "life" and "disability" contracts, in order to deprive Legg of the benefits of the Tennessee statute exempting "life" insurance from his creditors, and then re-combined

* At the time of the filing of the petition in bankruptcy the Cash Surrender Value was quite insignificant in amount, *i. e.,* $1,585, *minus* the $1,400 indebtedness (R. 6 B, 17).

into *one* contract so as to read into the "disability" contract a Cash Surrender Value, *which appears only in the "life" contract.*

If Legg's Disability contract is not *"life"* insurance, but is distinct and separate Disability insurance, then, he insists that the outlawed Disability contract *contains no provision for a Cash Surrender Value;* and, therefore, does not go to the Trustee (*Burlingham* v *Crouse,* 228 U. S. 459).

3. The confusion in the C. C. A.'s decision lies in this: In order to give the future Disability payments to the Trustee, the C. C. A. first held that the Disability contract was separate and distinct from the "life" contract, and, therefore, was *non*-exempt under the Tennessee statute exempting "life" insurance. But even that, standing alone, would not be sufficient to give the Disability income to the Trustee, as § 70(a) still permitted Legg to hold on to the policy *unless* it had a Cash Surrender Value (*Burlingham* v. *Crouse*).

Therefore, the C. C. A. was logically compelled to hold, either (1) that the Disability contract *had* a Cash Surrender Value, or (2) that the Disability contract was *not* even an "insurance policy" within the meaning of § 70(a). The C. C. A. did not explicitly hold either (1) or (2), so we must examine both alternatives:

(1) The Trustee in Bankruptcy *"set aside* [to Legg] said life insurance policy and the *cash surrender value* thereof as exempt" (R. 3), which was approved and confirmed by the Referee (R. 7, 10); District Court (R. 14), and C. C. A. (R. 25). The cash surrender value so

set aside to Legg was the full amount given in the Table *minus* the outstanding indebtedness on the policy (R. 3, 7, 17).

That was a recognition of the fact that the Disability contract, as a separate entity, had *no* Cash Surrender Value; for *if* it had a Cash Surrender Value, how much was it?—as the amount thereof would have to be subtracted from the Cash Surrender Value given in the Table before the latter could be set aside to Legg.

There is not a syllable in the policy to indicate that the alleged Disability contract has any Cash Surrender Value whatever.

As there was no Cash Surrender Value, the Trustee was not entitled to the Disability contract, or any future benefits thereof, as assets of the estate; and the bankrupt, Legg, was entitled to hold it as his own (Bankruptcy Act § 70(a); *Burlingham* v. *Crouse*).

(2) The other logical alternative (2) [which the C. C. A. did not rely on], *i. e.*, that "any insurance policy" in § 70(a) means any *life* insurance policy, is necessarily the only logical basis of its decision. We have just fully considered that at pp. 37-39, *supra*, and will not repeat the argument.

The C. C. A.'s argument seems to be that the Legg Disability contract is not a "life" policy but is a separate and distinct kind of indemnity contract with no Cash Surrender Value and not included in the insurance clause of § 70(a)(5); that it is *non*-exempt under the Tennessee statute, and consequently *non*-exempt under the Bank-

ruptcy Act; but that it is nevertheless a species of property which automatically passed to the Trustee in Bankruptcy, under the Bankruptcy Act §70(a)(1)(3)(5)(6). To that very complicated contention, we respond that it would do violence to the Congressional intention, as construed by this Court in *Holden* v. *Stratton,* 198 U. S. 202; *Hiscock* v. *Mertens,* 205 U. S. 202; *Burlingham* v. *Crouse,* 228 U. S. 459; *Everett* v. *Judson,* 228 U. S. 474; *Andrews* v. *Partridge,* 228 U. S. 479; and *Local Loan Co.* v. *Hunt,* 292, U. S. 234, namely, that the unfortunate debtor who surrendered all his property should have a new opportunity in life, and entitled to retain his *insurance* with its future protective and other qualities, subject only to paying to the Trustee the Cash Surrender Value, if any, of such policies as might be *non*-exempt under the State law.

In *Burlingham* v. *Crouse,* this Court expressed the idea we are trying to convey, when it said:

> "We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy *as a cash asset,* **otherwise to leave to the insured the benefit of his life insurance . . .** As we have construed the statute, its purpose was to vest the surrender value in the Trustee for the benefit of the creditors, **and not otherwise to limit the bankrupt in dealing with his policy."**

At the time of the bankruptcy, the Disability contract had no cash value. No sum was then available to Legg. Therefore, the Disability contract did not go to the Trustee; but Congress intended to leave to Legg the benefit of that insurance.

II. *If non-exempt, the Disability Contract's Cash Surrender Value (if any) should be ascertained; then Legg should be given an opportunity to pay such value to the Trustee, and thereafter to hold the Disability contract and the future income thereunder, free from the claims of his creditors.*

If the phrase "any insurance policy" [§ 70(a)] includes the Disability contract, then, as heretofore shown, if there is *no* Cash Surrender Value, the Trustee takes nothing, and Legg gets the Disability contract.

On the other hand, if the Disability contract *has* a Cash Surrender Value, then, by the plain words of § 70(a)(5), Legg should be given an opportunity to pay such value to the Trustee, and thereafter "to hold, own and carry such policy free from the claims of the creditors".*

FOURTH POINT

Any future "Disability" payments to Legg are in the nature of future earnings, or after-acquired property, neither of which passed to the Trustee upon the filing of the petition in bankruptcy.

I. CONSIDERED AS "FUTURE EARNINGS"

The *future* "disability" payments to Legg solely because of his *continuing* total and permanent disability, ought not

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* The Legg policy was never payable to Legg himself. It was first payable to his wife as beneficiary. Later, he changed the beneficiary to his children, reserving the right to change the beneficiary thereafter.

to go (as they severally fall due) to his creditors, who have already received *all the property which he owned at the time of bankruptcy.*

Legg ought to be able, after the bankruptcy, to receive, or have his children receive, the future "Disability" payments, upon the same theory that, in *Local Loan Co.* v. *Hunt,* 292 U. S. 234, it was held that the *future earnings* of a bankrupt after the adjudication, belonged to him, free of any pre-existing assignment of such future earnings to secure a pre-existing debt.

The Metropolitan Life's policy provides for the Disability payments here in controversy, if Legg is so totally and permanently disabled that he is

> "*prevented thereby* from engaging in any occupation and performing any work for compensation or profit" (R. 6 C).

These future Disability payments to Legg are in lieu of the earnings which he could make if he were not physically helpless. Therefore, Legg, in his *helpless* condition, should receive, at the hands of his Court, the same consideration with respect to the *future Disability payments,* as was accorded to the *able-bodied* bankrupt in *Local Loan Co.* v. *Hunt,* in respect of his *future earnings.*

In *Local Loan Co.* v. *Hunt,* the bankrupt, at the time of bankruptcy, possessed his *potential earning power;* and yet it was held that the *future results* of such earning power did *not* go to the creditors. So here, Legg's present potential right to receive future Disability payments, ought not to go to the creditors, who have already received everything of value which Legg owned at the

time of the bankruptcy.* The purpose of the Bankruptcy Act was to give to an *able-bodied* bankrupt a chance for the future. *A fortiori,* it must have intended to give a totally and *permanently disabled* bankrupt, the right to receive something accruing to him in the future, which was not *in esse* at the time of the bankruptcy.

The effect of the C. C. A.'s decision is to give Legg a vested remainder in his own hopeless disability; to treat that hopeless *disability* as an asset which passed to the Trustee; and to use it as a means to give to his creditors the future benefits which the insurance company wishes to pay to Legg on account of his helpless condition.

Legg's *disability* is not such a *cash asset* as the Bankruptcy Act passed to the Trustee. Legg's *disability* is analogous to the ordinary bankrupt's potential *ability to earn a salary in the future.* Such *potential ability* and such *future* earnings, when earned, are not assets of the estate. Neither are the future disability payments to Legg assets of the estate.

The Bankruptcy Act contemplated that when a bankrupt gave up all his cash assets to his creditors, he might

* This Court has construed the Bankruptcy Act to mean that when a bankrupt surrenders for distribution the property which he owned *"at the time of bankruptcy"*, including "whatever sum was available to the bankrupt at the time of bankruptcy *as cash assets* to be realized on surrender of the policy", he should receive "a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt"; and that the power of the bankrupt "to earn a living for himself and those dependent upon him is in the nature of a personal liberty quite as much if not more than it is a property right." *Frederick* v. *Fidelity Mutual,* 256 U. S. 395, 397; *Local Loan Co.* v. *Hunt,* 292 U. S. 234, 244, 245; *Louisville Bank* v. *Radford,* 295 U. S. 555.

begin life anew, with such ability as he may have. Legg, *totally and permanently disabled,* ought not to be placed on a worse basis than an *able bodied* bankrupt whose ability to earn a future living for himself and his family, is unimpaired. The Bankruptcy Act does not take away from the able bodied bankrupt any of that ability or future earnings. It certainly ought not to take away from disabled Legg the future income which he will receive solely on account of such disability.

If Legg recovers from his disability, the Disability payments cease (R. 6 C); and his ability to earn is restored. But his future earnings do not go to his creditors (*Local Loan Co. v. Hunt*). *A fortiori* the Disability payments should not go to them.

II. CONSIDERED AS "AFTER-ACQUIRED" PROPERTY

Future "Disability" payments are akin to "after-acquired property", because, in order for Legg to receive the future "Disability" payments as they shall severally fall due, the policy must be kept in force by the annual waiver of premiums through his continued disability; and in addition (R. 6 C):

(1) Legg must be alive;

(2) Legg must be totally and permanently disabled, so as to be prevented thereby from engaging in any occupation or performing any work for compensation or profit;

(3) Legg must annually prove to the company's satisfaction that he is so disabled.

The occurrence of Legg's total and permanent disability before his bankruptcy did not create a *vested property right in his disability,* to which his Trustee in Bankruptcy succeeded. It is not the occurrence of the disability, but its continuance and the performance of certain conditions by Legg during such continuance (p. 47, *supra*) that gives rise to his right to receive the disability payments.

Strictly speaking, Legg does not have a single right or cause of action for the disability payments, but only a succession of future rights and causes of action as each periodical payment accrues and remains unpaid (Cf. *Mobley* v. *New York Life,* 74 F. (2d) 588, cert. denied; *Porter* v. *Cas. Co. of America,* 120 N. Y. Supp. 71).

The judgment below should be reversed.

HENRY ROBERTS,
J. K. BROWN,
WM. MARSHALL BULLITT,
Counsel for Petitioner.

5 November, 1935.

[See Appendix for Relevant Statutes; Criticism of *In re Kern,* 8 F. Supp. 246; and State Statutes.]

APPENDIX

I.

Code of Tenn. (1932)

Sec. 8456. *Insurance on husband's life, effected by himself goes to wife and children.* Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the statutes of distribution, without being in any manner subject to the debts of the husband.

Sec. 8458. *Life insurance or annuity for or assigned the wife or children, or dependent relatives is exempt from claims of creditors.* The net amount payable under any policy of life insurance or under any annuity contract upon the life of any person [made for the benefit of, or assigned to, the wife and/or children, or dependent relatives of such person,] shall be exempt from all claims of the creditors of such person arising out of or based upon any obligation created after the effective date of this Code, whether or not the right to change the named beneficiary is reserved by or permitted to such person. (1925, ch. 113, Modified.)

Bankruptcy Act of July 1, 1898, as amended:

Sec. 6. The provisions of this title shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition. (July 1, 1898, c. 541, Sec. 6, 30 Stat. 548.)

Sec. 70 (*a*) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by

operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him. When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

II.

Criticism of In re Kern, 8 F. Supp. 246.

In *Ruvinsky* v. *Shonberg,* N. Y. Law Journal Sept. 10, 1935, it was held that where a man became disabled *before* bankruptcy, the "disability" income that became due *after* bankruptcy went to the disabled bankrupt, and *not* to the Trustee in Bankruptcy. The Court said:

> "The trustee cites and seemingly relies upon *In re Kern* (8 Fed. Supp. 246). This is an opinion by the District Court of the Southern District of New York. The case is in point and it does support the trustee's contention. The opinion, however, on this point is very brief and merely says (p. 249): 'Whatever the times of payment the right of the bankrupt to payments under the policies had been acquired long prior to bankruptcy and was a vested right at the time of petition filed.' For this statement three cases are cited. The cases, however,

seem not in point, as we shall shortly see, and the statement quoted that the bankrupt had a 'vested right' to the subsequent disability payments at the time of the adjudication seems contrary to the facts.

One of the cited cases is *In re Baudouine* (96 Fed., 536). This dealt with the income of a trust fund which had been left to the bankrupt. The provision of the statute that was applicable made the surplus of such income liable to the claims of creditors. The court held that the bankrupt's interest in the income was a vested one and that (p. 538): 'it was a present property right existing at the time when the adjudication was made, although the amounts due under it become payable to him from time to time afterwards.' There is no such interest in our case.

Another cited case is *In re Wright* (157 Fed., 544). This is a decision by the Circuit Court of Appeals in the Second Circuit. There the bankrupt had been managing agent for a life insurance company under a contract which had not expired and which entitled him to an interest in renewal premiums, when collected, on policies previously written, so long as the contract was in force, subject to the right of the company to terminate that interest, and with the proviso that upon his death his widow and estate were entitled to receive the interest for a stated period. The court held that that interest was property which the bankrupt could have transferred, and therefore it passed to his trustee. Excepting the premise, we agree with the conclusion, but in our case the claim to future payments was not property.

And the other cited case is *Fuller* v. *N. Y. Fire Insurance Co.* (184 Mass. 12). This held that the title to property remains in the bankrupt after the adjudication and up to the time of the appointment of a trustee, and hence, that where the property was destroyed by fire during that interval the trustee upon his appointment could enforce the policies. This holding is predicated upon the fact that the bankrupt had title until the trustee was appointed, and hence when the fire occurred the bankrupt acquired a cause of action on the policies which passed to the trustee upon his subsequent appointment. There is nothing in this holding that in any way aids the trustee's contention in our case."

III.

List of State Statutes recognizing that "disability" and "double indemnity" benefits may be in "life" policies.

Arizona	Revised Code 1928. Sec. 1853
California	Political Code. Sec. 594 General Laws 1931 Vol. 2. Act 3736 Sec. 11
Connecticut	Gen. Stats. 1930 Chap. 221 Sec. 4228.
District of Columbia	Act of Congress No. 436 of 1934, Chap. 5 Sec. 12
Idaho	Code Anno. 1932. Sec. 40-1913
Illinois	Smith & Hurd, Revised Stats. Chap. 73 Laws 1933, Sec. 230 & 373.
Indiana	Burns Anno. Statutes (1926) Sec. 8918.
Iowa	Code 1931 Sec. 8672 and 8673
Kansas	Supplement to Revised Stats. Chap. 231 of 1927 Sec. 40-401
Kentucky	Carroll's Kentucky Statutes (1922) Sec. 644
Maryland	Anno. Code 1924, Art. 48A, Sec. 16.
Massachusetts	General Laws of 1932, Chap. 175 Sec. 24
Michigan	Comp. Laws 1929. Sec. 12449.
Minnesota	Mason's Minn. Statutes (1927) Sec. 3426 As amended by Chap. 74 of Laws of 1935.
Missouri	Revised Statutes of 1929. Sec. 5690 & 5893
Nebraska	Comp. Stats. 1929, Sec. 44-606.
New Hampshire	Public Laws of 1926, Chap. 281, Sec. 23
New Jersey	Supplement to Compiled Statutes of 1930, Sec. 99-2.
New York	Insurance Law, McKinney's Con. Laws, Book 27, Sec. 107
North Carolina	Code 1931, Sec. 6489.
Ohio	General Code, Sec. 9385.
Oklahoma	Compiled Statues of 1931, Sec. 10456.
Oregon	Code 1930, Sec. 46-806 and 46-122 (5)
Pennsylvania	1928 Supplement to Penna. Stats. Sec. 12490B—629B.
South Dakota	Compiled Laws of 1929, Sec. 9346L.
Vermont	Public Laws (1933) Sec. 7084.
Virginia	Code of 1930, Sec. 4319.
Washington	Revised Stats. 1931, Sec. 7242A.

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No. 54.

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In the Supreme Court of the United States

OCTOBER TERM, 1935

GEORGE EVERETT LEGG,
Petitioner,

v.

E. ST. JOHN,
Trustee.

Certiorari to C. C. A. Sixth Circuit.

BRIEF FOR TRUSTEE.

CLAYTON SCYPHERS,
ROBERT BURROW,
Attorneys for Trustee.

FRANK T RILEY PUB CO KANSAS CITY MO

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The writ of certiorari having been granted we take up the discussion of the two determinative questions:

1. Is the Health Indemnity Supplementary contract an "insurance policy" within the meaning of the Bankrupt law, and do the indemnity monthly payments represent assets of the bankrupt's estate to be administered by the bankrupt court?

2. Are the indemnity payments free from the claims of creditors under the Tennessee exemption statutes?

Health Indemnity is not Insurance and is separate and distinct from the Life Policy.

The applicable Federal bankruptcy statute is quoted in the opinion of the Circuit Court of Appeals, (R. 23) as follows:

Section 110 (a) (5), Title 11, U. S. C:

> "* * * When any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representative, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings; otherwise the policy shall pass to the trustee as assets."

Every policy of insurance on the life of a citizen of Tennessee shall be construed as a Tennessee contract.

Code, 6086.

At the time G. E. Legg, filed his petition in bankruptcy there was in force a policy of insurance on his life in the Metropolitan Life Insurance Company, payable to his wife. As a part of the same policy there was a supplementary contract in which the Insurance Company, in consideration of an additional annual premium of $49.39 agreed, in case the insured became totally and permanently disabled, to pay him a monthly income of $10.00 for each $1,000.00 of insurance under said policy, until the insured is sixty years old. This was in addition to the life policy. (R. 60.)

Legg became totally disabled, and was himself being paid monthly sums of $174.50, when creditors attached

the money in the hands of the Insurance Company. He then filed his petition in bankruptcy.

The bankrupt law is the same as at the time of the decision of the case of Burlingham v. Crouse, decided more than twenty years ago. (228 U. S., 467.)

The bankruptcy statute had reference to life insurance. Congress could not have had in mind a health indemnity contract, such as is here involved, because such contracts were not written at that time. The Court may in construing the statute recur to the history of the times when it was passed in order to ascertain the reason as well as the meaning of particular provisions in it.

Mobile & Ohio v. *Tennessee*, 153, U. S. 502. (38: 799); 25 R. C. L., 1035.

In each of the eight reasons given in the petition for the writ of certiorari, except the seventh which is without any reason, it is urged that the "Supplementary contract" which provides for health indemnity is part of the life insurance policy, and, therefore, within the provision of the bankrupt law. (Brief, 3; B.)

That this supplementary contract is, for certain named purposes a part of the life policy, we admit. But there should be no dispute as to how far the two contracts are to be treated as one agreement. That is plainly provided for, as found by the learned Court of Appeals, in the "Supplementary Contract", which concludes:

> "This Supplementary Contract shall be deemed to be a part of the above numbered Policy and the provisions of said Policy concerning declarations and representations by the insured, restrictions, payment of premiums, change of beneficiary, and assignment are hereby referred to and by such reference made

a part hereof. No other provisions of said Policy shall be held or deemed to be a part hereof, except (a) The provision of the said Policy as to incontestability shall apply hereto, but shall not preclude the Company from requiring as a condition to recovery hereunder, due proof of such total and permanent disability as entitled him to the benefits hereof. (b) The provision of said Policy as to reinstatement shall apply hereto, except that this Supplementary Contract shall not be reinstated unless said Policy is in force and no premium is in default thereon, or unless said Policy is reinstated at the time of reinstatement of this Supplementary Contract." (R. 6C.)

The indemnity contract is to be deemed as part of the Policy only as to "declarations and representations of the insured, restrictions, payment of premiums, change of beneficiary, and assignment," and nothing else except the matters named in subsections (a) and (b), not relevant to any question here.

We mention some of the things that show that the Policy of insurance and the Supplementary agreement as to health indemnity are separate and distinct contracts:

1. The policy is signed by the President and Secretary of the Insurance Company. (R. 6A.)

The supplementary contract is also signed by them. (R. 6C.)

If but one contract the signing one time would have been sufficient. The Insurance Company must have understood that there were two contracts.

2. The premiums on the life policy and on the health indemnity are in separate and different amounts.

3. The indemnity feature may be cancelled by the insured without affecting the life policy. Note this provision:

> "This Supplementary Contract may be cancelled by the insured * * * by written request to the Company." (R. 6C.)

4. The life policy is payable to Beatrice A. Legg, on the death of the insured. (R. 6A.)

The health indemnity is payable "to the insured, or a person designated by him for the purpose", in monthly payments in case to total disability. (R. 6C, 2.)

It is only when the disability is "accompanied by mental incapacity" that the indemnity payments are to be made to "the beneficiary of record under said Policy." (R. 6C, 2.)

That is if the insured becomes totally disabled by reason of injury or disease, and the disability is accompanied with mental incapacity, so that the insured is not competent to receive the indemnity payments or to designate a person to receive them for him, then and then only is the beneficiary named in the Policy to be paid the indemnity monthly payments.

5. The hazard of the two contracts are different. The life policy is payable only on the death of the insured. The indemnity, with a greatly reduced premium, is payable in case of total disability and then only during the time of such disability. In any event the disability payments cease when the insured reaches the age of sixty years. The Tennessee Court of Appeals said:

> "At common law there were no exemptions from execution. Accordingly the general rule is that every